Supreme Court, U.S.
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In the
SUPREME COURT OF UNITED STATES

OCTOBER TERM, 1998

Venessa S. Patterson and
Matthew Patterson, *Petitioners*

v.

PREMIER BANK, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether 28 U.S.C. sec. 2000e-2(a)(1) affords a remedy to a woman who was verbally and physically harassed by a co-worker in one day, when little remedial action was taken by her employer

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

VENESSA PATTERSON AND MICHAEL PATTERSON,

Petitioners,

v.

PREMIER BANK, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Venessa Patterson and Michael Patterson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 20-A) and the opinion of the district court (App., infra, 1-A) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

STATUTORY PROVISION INVOLVED

Title 42 of the United States Code, section 2000e-(2)(a)(1) provides as follows:

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT

A. FACTS

Petitioner, Venessa Patterson, was employed by respondent, Premier Bank, for approximately ten years. At the time of this incident, Mrs. Patterson was a bank teller at the Republic Tower branch of Premier Bank in Baton Rouge, Louisiana. The assistant manager, Brenda Davis, and Claude Platte, the branch manager, had supervisory authority at this location.

James Lopez was a utility teller employed by Premier Bank. As a utility teller, Mr. Lopez was not assigned to a particular branch but worked wherever he was needed. Prior to June 16, 1994, Mr. Lopez was assigned to

the Republic Tower branch for a single day. Prior to that day, Mrs. Patterson and Mr. Lopez had never met. Moreover, Mr. Lopez was not a supervisor and had no supervisory authority over Mrs. Patterson.

On the day Mrs. Patterson and Mr. Lopez first met, they engaged in small talk when business was slow and discovered that Mr. Lopez knew Mrs. Patterson's husband. Their conversation led Mrs. Patterson to arrange a blind date for Mr. Lopez with another teller. Nothing unusual or unseemly occurred on this day.

On June 16, 1994, Mr. Lopez was again assigned to the Republic Tower branch. At some point in the day, Mrs. Patterson contends that Mr. Lopez approached her from behind and groped her by placing his hands on her waist without her permission. Later on in the day, at approximately 3:30 p.m. when Mr. Lopez retrieved his cash-in and cash-out documents, Mrs. Patterson said to Mr. Lopez, "James, wait a minute, what are you doing with those?" According to Mrs. Patterson, Mr. Lopez responded, "I'm going to ram them up your ____, and I'm quite sure they will fit. In dispute is exactly what Mr. Lopez said. Mrs. Patterson alleges that Mr. Lopez did not say where he was going to ram the documents. In a written statement given after the incident, Mr. Lopez claims he told Mrs. Patterson he was going to ram them up her "butt." After this exchange, Mrs. Patterson told Mr. Lopez not to talk to her like that and asked him what had he eaten for lunch.

Immediately thereafter, Mrs. Patterson called Brenda Davis to tell her of the incident. Mrs. Patterson related the statement made by Mr. Lopez. Ms. Davis suggested Mrs. Patterson discuss the incident with Mr. Lopez. Mrs. Patterson did as Ms. Davis suggested and spoke with Mr. Lopez. She told him that his remarks were vulgar, unwanted and unwelcome at which point, Mr. Lopez came up to Mrs. Patterson from behind, put his arms

around her upper waist and hugged her. As he hugged her, his arms rubbed her chest. Mrs. Patterson immediately panicked and freed herself from Lopez's grasp, telling him never to touch her again. Mr. Lopez then responded, "I guess I went too far." Prior to leaving the bank that evening, Mrs. Patterson told the branch manager, Mr. Platte, that she wanted to talk to him about Mr. Lopez the next morning.

The next morning, June 17, 1994, Mrs. Patterson met with Mr. Platte and Ms. Davis. Mrs. Patterson related to them the statement made by Mr. Lopez. She did not tell them of the physical contact. Mr. Platte responded by asking Mrs. Patterson whether she had done anything to upset Mr. Lopez and by telling her that he did not find what Mr. Lopez had said shocking. According to Mrs. Patterson, Mr. Platte asked her if perhaps Mr. Lopez had been joking. Mr. Platte informed Mrs. Patterson he would speak to Mr. Lopez's supervisor.

Within half an hour, Mr. Platte called Mrs. Patterson back into his office and apologized to her for not being more sensitive during the first meeting. Mr. Platte again told Mrs. Patterson he would speak with her supervisor.

Mr. Platte was out of the office the week of June 20-24. On Monday, June 20, Mrs. Patterson called Marlow Hill in branch administration and related what Mr. Lopez had told her. On this date, Mrs. Patterson also met with Tommy Jones, Vice President of Branch Operations, and Diane Leblanc from Human Resources. Mr. Jones and Mrs. Leblanc informed Mrs. Patterson that Mr. Lopez had been reprimanded and had explained to him that what he had done was wrong and that it had upset Mrs. Patterson. Mr. Lopez admitted he had made the offending statement and expressed remorse at having done so. By all accounts, the remainder of the week was uneventful.

Upon Mr. Platte's return to the branch on Monday, June 27, Mrs. Patterson contends that he did not greet her when she arrived and that he avoided her all day. On Tuesday, Mrs. Patterson alleges that she and Mr. Platte went to process the night deposit bags from the vault. Mr. Platte helped her gather the bags but then left her alone to record the night deposits. After processing the night deposit bags, Mrs. Patterson had an anxiety attack. She left work and went to see her primary health care physician. After that, she went to see Rose Ridgeway, a Premier employee assistance program counselor.

Mrs. Patterson never returned to work after Tuesday, June 28, 1994. She collected short-term disability and workers' compensation benefits.

Mrs. Patterson followed up on all of her complaints with Premier Bank. The only response she received was a letter informing her that the complaint had been investigated; Mr. Lopez's statement was enclosed.

Mrs. Patterson was subsequently informed by Meg Martinez, Premier Bank's benefits administrator, that her short-term disability benefits would expire on December 28, 1994. Ms. Martinez also informed Mrs. Patterson that she must return to work by that date or her employment would be terminated in accordance with bank policy. Mrs. Patterson complained to the President and CEO of Premier Bank, Walter Lockett but to no avail. Since Mrs. Patterson was unable to return to work under these conditions, she was terminated.

B. PROCEEDINGS BELOW

Petitioners, Venessa S. Patterson, and her husband, Michael Patterson, sued respondent, Premier Bank, N.A., Claude Platte, and James Lopez, in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana. Petitioners originally asserted state claims only, but when they amended the petition to include sexual discrimination claims under Title VII, respondent, Premier

Bank, timely removed the case to federal district court. Claude Platte and James Lopez were never served. Both Clause Platte and James Lopez are now deceased, and were dismissed as defendants under Rule 25(a) of the Federal Rules of Civil Procedure on July 14, 1997.

Thereafter, Premier Bank filed a motion for summary judgment pursuant to Fed. Rule 56(c). On April 7, 1998, the district court granted summary judgment. In doing so, the district court first found that Premier Bank had met its burden of proving that there was no genuine issue of material fact in this case. The district court then determined, as a matter of law, the Pattersons had failed to establish a claim of hostile work environment under Title VII. The district court further granted summary judgment as to the Pattersons' claims of discrimination under state law.

Petitioners appealed from this judgment to the United States Court of Appeals for the Fifth Circuit. On February 12, 1999, the Fifth Circuit affirmed, finding that summary judgment was properly granted for the reasons set forth by the district court

REASONS FOR GRANTING THE PETITION

Venessa Patterson was denied a chance to establish her federal and state claims of sexual harassment by the district court, a decision that was affirmed by the United States Court of Appeals for the Fifth Circuit.

Under Title VII of the Civil Rights Act of 1964, "[i]t shall be an unlawful employment practice for the employer ... to fail or refuse to hire or to discharge against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. sec. 2000e-2(a)(1). As this Court made clear in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), this language "is not limited to 'economic' or 'tangible" discrimination. The phrase "terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment," which includes requiring people to work in a discriminatorily hostile or abusive environment. *Meritor*, at 64, 106 S.Ct. at 2404, quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, no. 13, 98 S.Ct. 1370, 1374, 55 L.Ed.2d 657 (1978) (some internal quotation marks omitted).

In order to support a claim of a hostile work environment, and thus, defeat summary judgment, it must be established that petitioner that she was subjected to unwelcome sexual harassment based upon her sex that affected a term, condition, or privilege of employment. Mrs. Patterson must also establish that her employer knew or should have known of the harassment and failed to take remedial action.

In the case *sub judice*, there is no dispute that Mrs. Patterson is part of a protected group, the harassment was based on sex and the harassment was unwelcome. Mr.

Lopez never denied making the statement. It is unclear if Mr. Lopez was ever questioned about the offensive touchings. Mrs. Patterson's employer, Premier Bank, knew of the harassment because of Mrs. Patterson's immediate reporting of the incident.

The test used to determine if conduct creates a hostile work environment is both subjective and objective. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993). The conduct must be severe enough to create an objectively hostile work environment -- an environment that a reasonable person would find hostile or abusive. Likewise, the victim must subjectively perceive the environment to be abusive. *Harris*, 510 U.S. at 21, 114 S.Ct. at 370.. Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These made include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required. *Harris*, 510 U.S. at 23, 114 S.Ct. at 371.

The subjective element is clearly established here. Mrs. Patterson suffered a nervous breakdown after the series of incidents and has been unable to return to work since that time. Mrs. Patterson has undergone extensive treatment under the care of a psychiatrist.

The frequency of the conduct is more problematic. However, as noted by the United States Court of Appeals for the Seventh Circuit, "[a] Title VII plaintiff does not prove racial [or sexual] harassment or the existence of a hostile environment by alleging some 'magic' threshold

number of incidents." *Daniels v. Essex Group, Inc.*, 937 F.3d 1264, 1274 (7th Cir. 1991). The mere fact that there are a limited number of incidents involved in this case is not dispositive. It is only one factor to take into consideration. Obviously, the conduct was pervasive and severe enough to have such a detrimental effect on Mrs. Patterson.

Moreover, although there were a limited number of incidents, their effect is magnified in light of the non-action taken by Premier to rectify the situation, and the callousness of their response to Mrs. Patterson's complaints.

The conduct to which Mrs. Patterson was subjected to included was both verbal and physical. The statement Mr. Lopez admitted making, "I'm going to ram them up your ____, and I'm quite sure they will fit" is threatening, severe and humiliating. Compounding this verbal assault was the escalation of physical conduct of Mr. Lopez in first placing his hands on Mrs. Patterson's waist, then to her arms across her chest, and finally to her breasts.

> When no tangible employment action is taken against an employee, an employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Burlington Industries, Inc. v. Ellerth, ___ U.S. ___, 118 S.Ct. 2257, 2270, 141 L.Ed.2d 633 (1998).

In this case, Mr. Lopez admitted he made the offending to Mrs. Patterson in a handwritten statement. In effect, Mr. Lopez was given a slap on the wrist because he was only reprimanded. This reprimand is insufficient action to ensure that the harassment would cease. Moreover, the callousness of Premier Bank's response to Mr. Lopez's harassment must be factored into this equation. The initial response by Mr. Platte reflects that claims of sexual harassment are not given the attention they deserve.

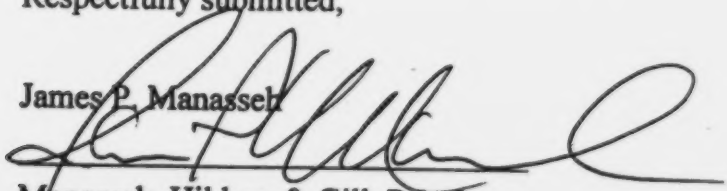
Although Mrs. Patterson received an employment manual when she began her employment with Premier Bank, she alleged that she did not have a copy of the sexual harassment policy, which was distributed only to supervisors. In spite of not knowing Premier Bank's policy, Mrs. Patterson reported Mr. Lopez's conduct to numerous officials in Premier Bank's chain of command, including the President.

In sum, the allegations of petitioners illustrate that there are genuine issues of material fact. The Fifth Circuit clearly erred in affirmed the district court's determination that summary judgment was warranted under the facts presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

VENESSA S. PATTERSON, ET AL CIVIL ACTION

VERSUS NO. 95-1975-B-M2

PREMIER BANK, ET AL

JUDGMENT

For written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment be entered dismissing plaintiff's suit with prejudice.

Baton Rouge, Louisiana. April 7, 1998.

/s/ Frank J. Polozola

_____

FRANK J. POLOZOLA
UNITED STATES DISTRICT JUDGE

FILED
U.S. DIST. COURT
MIDDLE DIST. OF LA.
98 APR-7 PM 2:30
SIGN_____

RICHARD T. MARTIN
CLERK

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

VENESSA S. PATTERSON, ET AL CIVIL ACTION

VERSUS NO. 95-1975-B-M2

PREMIER BANK, ET AL

RULING

I. Procedural History and Facts

Vanessa S. Patterson ("Patterson") and Matthew Patterson originally filed this suit in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana. Plaintiffs, Venessa S. Patterson and Matthew Patterson, originally brought state law claims only, but when they amended the complaint to include sexual discrimination claims under Title VII, defendant Premier Bank timely removed the case to this Court. Plaintiffs originally named James Lopez and Claude Platte as defendants, but never served them. Lopez and Platter are now deceased, and were dismissed as defendants under

Rule 25(a) of the Federal Rules of Civil Procedure on July 14, 1997.

Patterson was a bank teller employed by Premier Bank and she had worked for Premier for approximately ten years; she was assigned to the Republic Tower branch at the time relevant to this lawsuit. Lopez was a utility teller also employed by Premier; he was not assigned to a particular branch, but worked wherever he was needed. Lopez and Patterson had the same job titles, and neither was a supervisor of the other.

Lopez and Patterson worked together in the Republic Tower branch for one day in May of 1994 without incident. On June 16, 1994, Lopez was again assigned to the Republic Tower branch. They worked together throughout the day; plaintiff alleges that during the day Lopez came up behind her and put his hands on her waist. At approximately 3:30, at the end of Lopez's shift, Lopez picked up his cash-in and cash-out documents, probably intending to bring them to the main lobby. The practice at

the branch, however, was to bring the documents to the main lobby at the close of the day. Patterson questioned Lopez as to what he planned to do with the documents. Gesturing towards Patterson, Lopez responded: "I'm going to ram them up your _____, and I'm quite sure they will fit." Patterson told Lopez not to speak to her that way. Lopez left the area.

Plaintiff then reported the comment to Brenda Davis, the assistant branch manager; Patterson said nothing about the unwanted touching which allegedly occurred earlier in the day. Davis suggested she speak to Lopez. When Patterson approached Lopez to discuss the incident, he grabbed her from behind and hugged her. Patterson pushed Lopez's arms away and told him never to touch her again. Lopez responded that he guessed he had gone too far, and he left.

The next morning, June 17, Patterson met with Claude Platte, the branch manager, and Brenda Davis, the assistant manager. Plaintiff complained only about the

comment Lopez made, not about any unwanted touchings. Platte told plaintiff that he would speak to Lopez's supervisor. Patterson alleges that Platte responded insensitively to her concerns and improperly down-played the incident. Later that morning Platte apologized to Patterson for not being more sensitive and reassured her that he would talk to Lopez's supervisor.

The following week, Platte was out of the office. Monday morning plaintiff reported Lopez's comment to branch administration and was assured her complaint would be addressed. That day, Monday, June 20, Tommy Jones, Vice President of Branch Operations, and Diane Leblanc of Human Resources, met with Lopez. Jones and Leblanc reprimanded Lopez and explained that his behavior was inappropriate. Lopez admitted to having made the statement and signed a handwritten statement describing the incident.

Plaintiff continued to work at the bank for the week of June 20-24 without incident. Platte returned to the

branch on June 27. Patterson alleges that on Monday and Tuesday of that week Platte ignored her and refused her offers of assistance. Patterson left the bank after work on Tuesday, June 28 and never returned to work. Plaintiff went to her doctor after work. She suffered an anxiety attack or a nervous breakdown and began collecting short-term disability benefits and worker's compensation.

On July 1, 1994, plaintiff called Russell Gauthier in Premier's administration to complain about Platte's managerial skills.

On August 5, 1994, LeBlanc wrote to inform Patterson that Premier had investigated her complaint and that Lopez had been counseled as to his behavior. A copy of Lopez's handwritten statement was enclosed.

Patterson did not return to work. After six months Meg Martinez, Premier's benefits administrator, informed Patterson that her short-term disability would expire on

December 28, 1994. Martinez advised Patterson that she must return to work by that date or be terminated.

Patterson then called LeBlanc to complain that Lopez subjected her to two unwanted touchings -- he put his hands on her waist and later put his arms around her. On Sunday December 18, 1994, Patterson called Premier's then President and Chairman of the Board, Walker Lockett, at home to complain of Lopez' conduct.

Patterson did not return to work and was terminated.

II. Summary Judgment Analysis

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law."[1]

The well-established criteria that there must be no *geniune* issue of *material* fact before summary judgment will issue insures that a properly supported motion will not be defeated simply by the "existence of *some* alleged factual dispute."[2] With respect to "materiality," because the underlying substantive law is referenced to determine what facts are material,[3] only factual disputes that might affect the action's outcome under governing law can properly preclude summary judgment; disputes over facts which have no effect on the action's resolution are irrelevant.[4] In addition, even if material, a factual dispute will not prevent summary judgment if the dispute is not "genuine." Such a conclusion is reached when the

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[1] Fed. R. Civ. P. 56(c). *See also* Celotex Corp. v. Catrett, 577 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Cormier v. Pennzoil Exploration & Prod. Co., 969 F.2d 1559, 1560 (5th Cir. 1992).
[2] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L Ed. 2d 202 (1986).
[3] *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510.
[4] *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510.

evidence could not lead a rational trier of fact to return a verdict for the non-moving party.[5] In examining the record, the Court will view the evidence and draw all reasonable inferences therefrom in favor of the non-moving party.[6]

As always, the moving party bears the initial burden of establishing that there is no genuine issue of material fact.[7] In this situation, where the moving party does not bear the burden by simply informing the Court of the basis for its motion and either producing evidence that negates the existence of a material element in the non-moving party's claim or defense or identifying to the Court those portions of the record which demonstrates the lack of proof supporting a crucial element of the non-movant's case.[8]

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[5] *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510. *See also* Kelley v. Price-Macemon, Inc., 992 F.2d 1408, 1413 (5th Cir. 1993) ("If, on the other hand, the factfinder [sic] could reasonably find in [favor of the non-moving party], then summary judgment is improper.").

[6] *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513; Newport Ltd. v. Sears, Roebuck & Co., 6 F.3d 1058, 1064 (5th Cir. 1993).

[7] Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

[8] *Celotex*, 477 U.S. at 323-24, 106 S.Ct. at 2553; Latimer v. Smithkline & French Labs., Div. Of Smithkline Beckman Corp., 919 F.2d 301, 303 (5th Cir. 1990); Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990).

Once the moving party makes the proper showing, the burden shifts to the non-moving party to designate "specific facts" in the record, by way of non-conclusory affidavits, depositions, answers to interrogatories or admissions on file, which evidence that there is a genuine issue for trial.[9] Because it bears the ultimate burden of proof at trial, the non-moving party is required to establish each element crucial to its action "since a complete failure of proof concerning an essential element of the non[-]moving party's case necessarily renders all other facts immaterial."[10] The non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings and "must do more than simply show there is some metaphysical doubt as to the material facts."[11] When all the evidence presented by both parties "could not lead a rational trier of fact to find for the non-moving party, there

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[9] *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553; Kelley v. Price-Macemon, Inc., 992 F.2d at 1413.
[10] *Celotex*, 477 U.S. at 322-23, 106 S.Ct. at 2552.
[11] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

is 'no genuine issue for trial'" and summary judgment is proper.[12]

Upon reviewing the facts in this case, the Court concludes that the defendant has met its burden of proving that there is no genuine issue of material fact in this case. Thus the burden shifts to the plaintiffs to establish the elements of their case.

III. Analysis

The plaintiffs have filed claims under Title VII for gender discrimination based on a hostile work environment. Plaintiffs have also brought state-law sexual discrimination claims based on Louisiana Revised Statutes 23:1006 and 51:2231. Plaintiffs have brought a claim of negligent hiring and training against Premier, as well as a claim for loss of consortium. As Lopez and Platte have been dismissed as defendants, the Court will not consider any claims the plaintiffs originally brought against them.

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[12] *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.

Patterson's claims under Title VII are based on four alleged incidents: (1) Lopez's alleged unwanted touching of her waist on June 16, 1994: (2) Lopez's statement on June 16, 1994; (3) Lopez's alleged unwanted hug on June 16, 1994; and (4) Platte's alleged insensitivity to and avoidance of the plaintiff on June 16, 27 and 28, 1994.

To support a claim of hostile work environment, Patterson must prove that:

> (1) she belongs to a protected group; (2) she was subject to unwelcome sexual harassment (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a term, condition, or privilege of employment (i.e., that the sexual harassment was so pervasive or severe as to alter her conditions of employment and create an abusive work environment); and (5) the employer knew or should have

known of the harassment and failed to take prompt remedial action.[13]

"To be actionable, the challenged conduct must create an environment that a reasonable person would find hostile or abusive."[14] In order to determine whether or not an environment is hostile or abusive, the Court must look at all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[15]

Here the plaintiff alleges only three instances of improper conduct by a co-worker and her subjective belief that her supervisor treated her insensitively and avoided working with her for two days. As to the conduct by Lopez, Patterson worked with the offender for only two

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[13] Farpella-Crosby v. Horizon Health Care, 97 F.3d 803, 806 (5th Cir. 1996) (citations omitted).
[14] *Farpella-Crosby*, 97 F.2d at 806.

days, and without incident for the first day. When she reported Lopez's misconduct, he was promptly reprimanded. As to Platte's conduct, Platte may not have chosen the ideal words to respond to Patterson's concerns, but he and Premier did take the appropriate, prompt actions to reprimand Lopez and ensure that Patterson would not be subject to any such conduct in the future. Further, Platte promptly apologized for any insensitive remarks and reassured the plaintiff that he would address the problem. It is important to note that Patterson made no complain of discrimination against her supervisor; she only complained that his managerial skills were not satisfactory. Accepting all of Patterson's allegations as true, this Court finds that, as a matter of law, plaintiffs have failed to establish a claim of hostile work environment under Title VII.

As to plaintiffs' state-law claims of discrimination based on Louisiana Revised Statutes 23:1006 and 51:2231

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[15] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993).

et seq., Louisiana law tracts the federal law on discrimination. When interpreting Louisiana's discrimination law, Louisiana courts rely on federal employment case law.[16] Thus, this Court concludes that the plaintiffs have failed to establish a claim of discrimination under Louisiana anti-discrimination law for the same reasons they failed to establish a claim under federal law.

As to the plaintiffs claims for negligent hiring and training against Premier, the plaintiff has failed to provide any evidence to support such a claim.

Finally, the Court finds that the plaintiff has failed to state a claim against Premier, Lopez or Platte under Louisiana Civil Code article 2315 et. seq. for which Premier could be liable. Article 2315 does not create

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[16] *See* Plummer v. Marriot Corp., 654 So.2d 843, 848 (La. App. 4 Cir. 1995), *writ denied* 660 So.2d 460 (La. 1995); Polk v. Pollard, 539 So.2d 675, 676 (La. App. 3 Cir. 1989); Bennett v. Corroon and Black Corp., 517 So.2d 1245 (La. App. 4 Cir. 1987), *writ denied*, 520 So.2d 425 (La. 1988).

liability for employment discrimination.[17] As to the plaintiff's claims of intentional infliction of emotional distress, Patterson has offered no evidence to support such a claim. In order to prove intentional infliction of emotional distress, the plaintiff must prove that: the conduct was extreme and outrageous; the emotional distress suffered was severe; and that the defendant "desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result ...."[18] The Louisiana Supreme Court characterized such behavior which would rise to this level as conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community."[19] Although Lopez's conduct might have been

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[17] *See* Caletka v. State Farm Mutual Automobile Ins. Co., 936 F.Supp. 380 (W.D. La. 1996); Baynard v. Guardian Life Ins. Co., 399 So.2d 1200 (La. App. 1st Cir. 1981).

[18] White v. Monsanto Co., 585 So.2d 1205, 1208-10 (La. 1991). *See also* Deus v. Allstate Ins. Co., 15 F.3d 506 (5th Cir. 1994), *cert. denied*, 513 U.S. 1014, 115 S.Ct. 573, 130 L.Ed.2d 490 (1994).

[19] *White*, 585 So.2d at 1209-10 (La. 1991).

both rude and inappropriate and Platte's response may not have the ideal one, the plaintiff has failed to indicate any behavior which rises to this level.[20] The Court concludes that the plaintiff has not made a valid claim against Lopez or Platte based on Louisiana Civil Code articles 2315 et. seq. Thus, any claim based on Articles 2315 et seq. Alleged against Premier falls as well. Furthermore, Premier could not be vicariously liable for any intentionally tortious conduct outside the course and scope of employment.[21]

Since Patterson has failed to establish any of her claims, Matthew Patterson's claims for loss of consortium also fail, as such claims are derived from Patterson's claims.

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[20] The Fifth Circuit has consistently held "ordinary employment disputes" do not give rise to an intentional infliction claim. *See* Deus, 15 F.3d at 515.

[21] Labrane v. Lewis, 292 So.2d 216 (La. 1974).

In conclusion, the Court finds that the defendant is entitled to summary judgment on all claims brought by the plaintiffs.

Therefore:

IT IS ORDERED that defendant's motion for summary judgment be and it is GRANTED as to all claims.

IT IS FURTHER ORDERED that any and all claims against James Lopez and Claude Platte be dismissed as moot.

Baton Rouge, Louisiana, this 7 day of April, 1998.

/s/ Frank J. Polozola

FRANK J. POLOZOLA
UNITED STATES DISTRICT JUDGE

APPENDIX B

U.S. COURT OF APPEALS
FILED

FEB 12 1999

CHARLES R. FULBRIDGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 98-30458

VENESSA S. PATTERSON;
MATTHEW PATTERSON, JR.

Plaintiff-Appellants,

Versus

PREMIER BANK, CLAUDE PLATTE;
JAMES LOPEZ,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
(95-CV-1975)

Before JOLLY, WIENER, and PARKER, Circuit Judges.

PER CURIAM:*

In this Title VII sexual harassment case, Plaintiffs-Appellants Venessa and Matthew Patterson ask us to reverse the district court's grant of summary judgment in favor of Defendant-Appellant Premier Bank,[1] dismissing the Pattersons' action. They insist that the district court erred in concluding that (1) the conduct complained of was neither severe nor pervasive and thus was not actionable under Title VII, (2) the actions taken by Premier to deter recurrence of such inappropriate behavior after Mrs. Patterson complained were prompt and adequate, and (3) the inappropriate conduct of Lopez, a non-supervisory

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

fellow employee, was not sufficiently egregious to be actionable under Louisiana law, either as a violation of state anti-discrimination law or as the intentional infliction of emotional distress. Our de novo review of the record on appeal in light of the applicable law and the arguments of counsel advanced in their respective appellate briefs and their oral presentations to this court, satisfies us that summary judgment was properly granted for the reasons set forth by the district court.

AFFIRMED.

[1] Defendants Platte and Lopez are now deceased and have been dismissed as defendants pursuant to Fed. R. Civ. 25(a).